DIVISIONS III and IV

CA05-522

August 30, 2006

ROLINDA KIGHT APPELLANT	APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. JV-2003-40]
V.	HON. LINDA P. COLLIER, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	CONCURRING OPINION ON DENIAL OF PETITION FOR REHEARING

JOHN MAUZY PITTMAN, Chief Judge, concurring. I agree that the decision to affirm this case was correct, but I do so for the reasons set out in my concurrence to the opinion delivered on March 8, 2006 (*Kight II)*, and not for the reasons stated by the majority. It is true that the ADHS attorneys had no reasonable basis for arguing that our mandate did not require ADHS to provide additional reunification services. Nevertheless, the fact remains that ADHS agents in the field did attempt to provide reunification services, and were stymied in their attempts to do so by appellant's own refusal to cooperate. These new circumstances resulted in a second petition to terminate appellant's parental rights based on events that occurred subsequent to the prior termination hearing. Given that the termination order under review was based on subsequent events, it was not barred by our initial mandate.

The initial removal of the children in this case was occasioned by appellant's inability to provide proper parenting because of her illegal drug use. This court's original opinion held, erroneously,[1] that appellant had corrected her drug-abuse issues; that a relapse into drug

[1]This is not to suggest that this court's initial order is not binding because it was erroneous. It is axiomatic that a decision of an appellate court establishes the law of the case for trial upon

use while services were being offered was insufficient to terminate parental rights; and that it was speculative to believe appellant would continue a relationship with her cocaine supplier, Raymond Morgan. *See Kight v. Arkansas Department of Human Services*, 87 Ark. 230, ___ S.W.3d ___ (2004) (*Kight I*). As it happened, after this court's erroneous holding it came to pass that appellant did in fact resume her relationship with Raymond Morgan, who was seen at her home on two occasions in the early morning hours.

Clearly, whether the trial court expressly ordered it or not, appellant's case *was* reopened by ADHS after this court's mandate issued. Even before our mandate issued, ADHS began attempting to locate appellant in July 2004 as soon as it became aware of our decision in *Kight I*. At a review hearing on August 31, 2004, ADHS advised the trial court that, although appellant was aware of the reversal and had been in contact with her attorney,

---

remand and for the appellate court itself upon subsequent review; on the second appeal, the decision of the first appeal becomes the law of the case and is conclusive of every question of law or fact decided in the former appeal, and also of those which might have been, but were not, presented. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002). This court's decision in the first appeal ordered that appellant be provided with services designed to remedy her inadequacies and permit her children to be returned to her custody. Implementation of this order, however, was made impossible by appellant's subsequent refusal of services. For over one hundred and fifty years, it has been the law in the State of Arkansas that the doctrine of law of the case does not bind the inferior court with respect to matters arising subsequent to the decision of the appellate court. *Cunningham v. Ashley*, 13 Ark. 653 (1853). One hundred years ago, the Arkansas Supreme Court held that an appellate court's judgment is not controlling on retrial where the evidence on the issue presented is materially different. *Hartford Fire Insurance Co. v. Enoch*, 79 Ark. 475, 96 S.W. 393 (1906). This rule was repeated in 1923 in *Carter v. Bates*, 158 Ark. 640, 249 S.W. 355 (1923), and again in 1986 in *Potter v. Easley*, 288 Ark. 133, 703 S.W.2d 442 (1986).

Without a doubt, the trial court was required by our mandate in *Kight I* to provide reunification services. However, it is a familiar maxim of the law that *lex non cogit ad impossibilia,* and appellant's refusal to accept those services made it impossible for the trial court to comply with our mandate. This refusal constituted a change in the circumstances presented in *Kight I*, where appellant presented herself as a recovered drug-abuser who had been guilty only of minor backsliding and who earnestly desired more time to comply with the case plan. To characterize appellant's conduct as the same allegations concerning appellant's drug abuse that were the subject of *Kight I* is to refuse to acknowledge the elementary difference between a mother asking for more time to recover from drug abuse, as opposed to a mother who, on remand, utterly refuses to cooperate in that recovery.

she could not be located and had not contacted ADHS. Appellant finally contacted her caseworker on October 20, 2004. The Department was ready and willing to resume visitation between the appellant and the child. However, because drug use had been the major cause of the termination of appellant's parental rights, drug testing was a prerequisite to visitation. At a meeting arranged by her caseworker shortly thereafter, appellant was informed that drug testing services would be resumed. This offer was angrily rejected by appellant, who refused to take any drug test given by ADHS, stating that such tests were a nuisance that "interrupt[ed] her plans." Although appellant had not seen her children for approximately eighteen months at the time of the meeting, appellant did not mention or inquire about them at the meeting. Appellant was offered, and refused, drug tests on November 3, 6, 9, 17, and 21. Appellant attended a staffing meeting conducted by ADHS on November 17. A family services worker with the Division of Child and Family Services testified that appellant was intoxicated at that meeting, exhibiting slurred speech and a smell of alcohol on her breath and her clothing. Although she was, as a result, directed to report to the police department to take a breathalyser test, appellant failed to do so. Appellant refused all voluntary drug testing, but was required to submit to a drug test by the trial judge when she appeared at a hearing on November 23, 2004. Although appellant flatly denied any drug use when she testified at the hearing, the results of that drug test were positive. Home visits, necessary for the resumption of visitation with the children, were also offered by ADHS, but appellant at times refused to come to the door of her home even though she could be heard inside. Appellant did not respond to notes left on her door or to messages left on her cell phone.

Appellant, by her refusal to submit to drug testing or cooperate in other necessary services, precluded any meaningful attempts at reunification. The law does not require a vain and useless act, *Noble v. State*, 326 Ark. 462, 932 S.W.2d 752 (1996), and, as I noted in my

concurrence in *Kight II*, I believe appellant's refusal to cooperate with the reunification services ordered by our mandate made reunification impossible and supported the trial court's grant of the second petition to terminate her parental rights.